(1)

00 - 827 NOV 21 '00

No. _____

In The

Supreme Court of the United States

B. J. PAYNE,

Petitioner,

v.

CLIFFORD M. HINDS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

WELLON B. POE*
Assistant Attorney General
4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105
(405) 521-4274
FAX (405) 528-1867

GARY J. JAMES
P.O. Box 26684
Oklahoma City, OK 73126
(405) 521-9900

**Attorney of Record* — *Attorneys for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27pp

QUESTIONS PRESENTED

1. Does the Court of Appeals lose jurisdiction under *Behrens v. Pelletier* to entertain an appeal from a denial of summary judgment based on qualified immunity simply because the district court states that the denial is based on a "genuine issue of material fact?"

2. Does the Court of Appeals have the authority or duty to inquire into what "genuine issues of material fact" actually exist and then undertake a review of the record to reach the Court's own factual determinations?

3. Where, in a 42 U.S.C. § 1983 action for false arrest, an arresting officer states facts which would support a finding of probable cause, does the question of probable cause become a legal question which a Court of Appeals must review for a determination of qualified immunity?

4. Where, in a 42 U.S.C. § 1983 action for excessive force, there is no evidence that a defendant officer acted in a manner inconsistent with a reasonable officer, does the question of whether defendant is entitled to qualified immunity become a legal question which a Court of Appeals must review for a determination of qualified immunity.

LIST OF PARTIES

The parties to this proceeding on Petition for Writ of Certiorari are:

Petitioner: B. J. Payne

Defendant in the District Court and Appellant in the United States Court of Appeals for the Tenth Circuit

Respondent: Clifford M. Hinds

Plaintiff in the District Court and Appellee in the United States Court of Appeals for the Tenth Circuit

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	4
THE TENTH CIRCUIT OPINION AND ORDER IS BOTH ERRONEOUS AND IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS	4
CONCLUSION	9

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Behrens v. Pelletier, 516 U.S. 299 (1996) 5, 6, 7

Cottrell v. Caldwell, 85 F.3d 1480 (11th Cir. 1996)..... 6

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865 (1989) 3

Johnson v. Jones, 515 U.S. 304 (1995).....5, 7

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985) 4, 5, 8

Salin v. Proulx, 93 F.2d 86 (2nd Cir. 1996) 6

FEDERAL STATUTES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983.....2, 3

Fed. R. Civ. P. 50(b)(2)(B) 1

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner B. J. Payne respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The Order of the United States Court of Appeals for the Tenth Circuit dismissing Petitioner's appeal is dated August 23, 2000. Order, Case No. 00-6070 (Appendix A).

The United States Court of Appeals' Order dismissed the appeal on the basis that it lacked jurisdiction for the appeal from the United States District Court for the Western District of Oklahoma's denial of Petitioner's Motion for Judgment pursuant to Rule 50(b)(2)(B) of the Federal Rules of Civil Procedure based on the defense of qualified immunity (Appendix B).

The opinions of the Court of Appeals and the district court are unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit dismissed the appeal for lack of jurisdiction over the appeal of the denial of a Motion for Judgment pursuant to Fed. R. Civ. P. 50(b)(2)(B) on August 23, 2000. Petitioner invokes this Court's jurisdiction pursuant to 28

U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed within 90 days of August 23, 2000.

STATUTORY AND CONSTITUTIONAL PROVISIONS

United States Code, Title 42:
§ 1983. Civil Action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

Amendment IV Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. This is an action pursuant to 42 U.S.C. § 1983, wherein Respondent Hinds seeks recovery against Payne while Payne was acting under color of state law as a Trooper for the Oklahoma Highway Patrol.

2. In the Complaint, Hinds alleged that Payne falsely arrested him and used excessive force during the course of that arrest.

3. During the course of this action, Petitioner Payne filed a Motion for Summary Judgment against both the false arrest and excessive force claims.

4. Payne based his Motion for Summary Judgment, on part, on the defense of qualified immunity.

5. In response to Payne's Motion for Summary Judgment, Plaintiff Hinds responded but failed to wholly introduce any evidence showing what a reasonable officer would have done in the same circumstances. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872 (1989) (whether the force was reasonable must be judged from the perspective of a reasonable officer on the scene). Plaintiff also failed to provide any evidence that would contradict a finding that the arrest of Hinds was supported by probable cause.

6. The District Judge denied Payne's Motion for Summary Judgment denying him the defense of qualified immunity and Payne appealed to the Tenth Circuit.

7. The issue on appeal was whether Payne was entitled to judgment based in part on qualified immunity.

8. The Court of Appeals for the Tenth Circuit declined to accept jurisdiction of the appeal. It held that "An Order denying qualified immunity on summary judgment is not appealable if it merely determines the facts asserted by the Plaintiff or sufficiently supported by evidence in the record to survive summary judgment. Nor does this Court have jurisdiction to reverse the district court's factual finding, including a finding that a genuine issue of fact exists." (Citations omitted). (Court of Appeals slip op. at 2).

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to resolve a conflict between the Circuits and to correct a lower court error.

THE TENTH CIRCUIT OPINION AND ORDER IS BOTH ERRONEOUS AND IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

The Tenth Circuit Court of Appeals' refusal to take jurisdiction of an appeal of the denial of qualified immunity is in conflict with this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985) where this Court held:

> a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.

Id. at 530. This Court reasoned that qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526 (emphasis in original).

The Tenth Circuit Court of Appeals refused to take jurisdiction of the appeal of the denial of qualified immunity merely because of an assertion by the district court of the existence of a "genuine issue of material fact" also runs afoul of the decision of this Court in *Behrens v. Pelletier*, 516 U.S. 299 (1996) and *Johnson v. Jones*, 515 U.S. 304 (1995).

The actions and opinion of the Tenth Circuit effectively deny a civil defendant the defense of qualified immunity any time that a district court denies summary judgment by merely stating that there are "genuine issues of material fact" whether or not such issues actually exist. In fact, the effect of the Tenth Circuit ruling in this case is a refusal to look beyond the language of the district court's Order to actually determine if any genuine material issue of fact actually exists. This blanket refusal to accept jurisdiction in qualified immunity cases is clearly not what the Court intended in *Behrens*.

In the present case, the issue before the Tenth Circuit was whether Petitioner Payne was entitled to the defense of qualified immunity on the claims of false arrest and excessive force. In regards to the issue of false arrest, it is not disputable that where an officer has probable cause to arrest an individual, he is not liable for false arrest. The issue of probable cause is, of course, a legal question based on the facts presented to a court. In regards to the

excessive force claim, the standard is whether the actions of the officer were objectively reasonable under the circumstances, requiring a legal determination.

Thus, where the issue is not merely of evidentiary magnitude but rather is one that goes to the heart of the legal issue, the appeals court does have jurisdiction to review the appeal. The issues as to the false arrest claims presented is not whether the Plaintiff can prove a set of facts. It is whether under a set of given facts, the Plaintiff can meet their requisite legal standard to overcome the asserted qualified immunity defense. That is the very kind of issue that *Behrens* expressly reserved for the appeals court yet the issue the Tenth Circuit expressly refuses to consider.

However, at least one other circuit has concluded that a finding of "genuine issues of material fact" by a district court does not preclude an immediate appeal on the issue of qualified immunity and review by the appeals court. The Second Circuit Court of Appeals in *Salin v. Proulx*, 93 F.2d 86, 89 (2nd Cir. 1996) determined that "*Behrens* laid to rest any possibility that a district court's mere assertion that disputed factual issues existed was enough to preclude an immediate appeal."

Likewise, the Eleventh Circuit Court of Appeals has found that *Behrens* does not prohibit an appeals court to review an interlocutory appeal of a denial of summary judgment which was denied on the basis that a "genuine issue of material fact" existed. *Cottrell v. Caldwell*, 85 F.3d 1480, 1486-87 (11th Cir. 1996). The Eleventh Circuit in *Cottrell* added that the Circuit Court also could accept or reject the district court's findings of fact as they relate to

the defense of qualified immunity, supplement the district court's findings or even reach their own findings of fact.

The *Behrens* Court explained that "*Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they arise in a qualified-immunity case . . . ." 516 U.S. at 312. The Court then held that "*Johnson* permits a defendant to claim on appeal that all of the conduct with the district court deemed sufficiently supported for purposes of summary judgment" was objectively reasonable, and further instructed that where the district court has not identified the particular charged conduct that it deemed adequately supported, "*Johnson* recognizes that under such circumstances 'a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.' " *Id.* (quoting *Johnson*, 515 U.S. at 319).

This same analysis applies equally to the claims of excessive force of Plaintiff. Thus, the Tenth Circuit Court of Appeals has jurisdiction to hear Payne's appeal and erred in refusing to do so.

The difficulty circuit courts have had in determining what standard to use to review this type of case has been recognized by this Court. On November 13, 2000, this Court granted a writ of certiorari in *Saucier v. Katz*, Case No. 99-1977 to determine what the applicable standard is for a circuit court to use in determining the issue of qualified immunity in a false arrest/excessive force civil rights action. The standard that will be established by this

Court will provide the Circuit Courts of Appeal direction on how far a court may delve into the facts of a case to review a decision of a trial court denying qualified immunity based on a "genuine issue of material fact."

The timing of the decision on the qualified immunity issue is not relevant to the jurisdiction of the Tenth Circuit Court of Appeals. Qualified immunity is immunity from suit and the immunity is lost if the defendant is forced to trial. *Mitchell, supra* at 526. In this case, if Payne is compelled to proceed to trial, the immunity would be effectively lost. The Tenth Circuit's refusal to accept jurisdiction deprives Payne of the benefits of immunity from suit. Since the Tenth Circuit erred in refusing to accept jurisdiction when the Defendant had asserted qualified immunity, this Court should accept this Petition in order to correct the error of the Tenth Circuit.

CONCLUSION

This Court should grant certiorari to review the Tenth Circuit Court of Appeals' decision that it lacked jurisdiction and upon review, remand with instructions to consider the appeal on the merits.

Respectfully submitted,

WELLON B. POE* OBA #12440
Assistant Attorney General
4545 N. Lincoln, Suite 260
Oklahoma City, OK 73105
(405) 521-4274
FAX (405) 528-1867

GARY J. JAMES
P.O. Box 26684
Oklahoma City, OK 73126
(405) 521-9900

*Attorney of Record

Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CLIFFORD M. HINDS, Plaintiff-Appellee,	)	
v.	)	No. 00-6070
B.J. PAYNE,	)	DC No. 98-CV-1361-R
Defendant-Appellant.	)	

ORDER

Filed August 23, 2000

Before **BALDOCK, BRORBY** and **HENRY,** Circuit Judges.

We dismiss this interlocutory appeal from the denial of qualified immunity for lack [sic] jurisdiction. *See Behrens v. Pelletier,* 516 U.S. 299 (1996); *Johnson v. Jones,* 515 U.S. 304 (1995).

The plaintiff filed this civil rights action against a police officer alleging use of excessive force during an arrest and illegal arrest. The defendant filed a motion for summary judgment, arguing that he is entitled to qualified immunity.

The district court denied the motion, concluding that there are genuine issues of material fact. It is from this order that the defendant appeals.

Orders denying qualified immunity before trial are appealable to the extent they resolve abstract issues of law. *See Behrens*, 516 U.S. at 313; *Johnson*, 515 U.S. at 312-14. "An order denying qualified immunity on summary judgment is not appealable if it merely determines the facts asserted by the plaintiff are sufficiently supported by evidence in the record to survive summary judgment." *Foote v. Spiegel*, 118 F.3d 1416, 1422 (10th Cir. 1997). Nor does this court have jurisdiction to review the district court's factual findings, including a finding that a genuine issue of fact exists. *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1259 (10th Cir. 1998).

Where, as here, the district court merely concludes that the plaintiff has presented sufficient evidence from which a jury could find in his favor and that genuine issues of material fact existed with respect to the reasonableness of the defendant's conduct, the order is not reviewable. *Myers v. Oklahoma County Board of County Commissioners*, 80 F.3d 421, 425 (10th Cir. 1996) (holding that where the district court concluded that genuine issues of material fact existed with respect to the reasonableness of the defendants' conduct, *Johnson* barred interlocutory appeal).

APPEAL DISMISSED. The mandate shall issue forthwith.

Entered for the Court
PATRICK FISHER, Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CLIFFORD M. HINDS,	)	
Plaintiff,	)	
v.	)	
STATE OF OKLAHOMA, ex rel. OKLAHOMA DEPARTMENT OF PUBLIC SAFETY, and B.J. PAYNE,	)	CIV-98-1361-R
Defendants.	)	

ORDER

(Filed Feb 7 2000)

This matter comes before the Court on the Motion for Summary Judgment, filed by Defendants, the State of Oklahoma, ex rel. Oklahoma Department of Public Safety ("DPS"), and B.J. Payne. Plaintiff, Clifford Hinds, responded in opposition to the motion. The Court has considered the parties' submissions and finds as follows.

Factual Background

Plaintiff filed this action pursuant to 42 U.S.C. § 1983, alleging the violation of his civil rights by Defendant Payne. Specifically Plaintiff alleges that he was subjected to an unlawful arrest, and that the arrest was effectuated with excessive force, in violation of the Fourth Amendment. Plaintiff also seeks damages from the DPS pursuant to state law. Plaintiff's claims arise from the following facts.

On November 12, 1997, Trooper Payne, an Oklahoma State Trooper in the Boise City area, was called about a burned out and abandoned vehicle just west of Keyes, Oklahoma, on U.S. Highway 66. Payne arrived at the scene and noticed an Oklahoma Department of Transportation ("DOT") truck removing ice and snow from the highway near the vehicle. Two DOT employees told Defendant Payne that they were blading the same road early that morning, when they came across the vehicle, which had slid off the road and become stuck. The DOT employees talked to the driver and tried to help, but were unsuccessful. Payne asked the DOT employees if the driver, a hispanic male, appeared to have been drinking near the time of their conversation. The employees nodded yes.

Payne obtained the vehicle tag number and traced the registration of the car to Jesus Salvador Castillo of Keyes. Someone at the sheriff's office told Payne, via radio, that Castillo lived on the Hinds Ranch. Castillo works for Clifford Hinds, the eighty year-old owner of the ranch and Plaintiff in this action Trooper Payne proceeded to Keyes City Hall in effort to determine the location of the Hinds ranch. While there he was told to be careful with the Hinds family. He received directions and drove out to the ranch to speak with Castillo in furtherance of his investigation into the abandoned car

Payne arrived at the ranch and approached the Hinds' residence. Mr. Hinds answered the door, and Payne explained his desire to speak with Castillo. Hinds offered to show Payne to Castillo's residence Hinds walked to Trooper Payne's car and sat down. The two men drove to behind the Hinds residence, where there

was a smaller house. A man was standing outside in front of that house. Trooper Payne stopped his car, and he and Hinds exited the vehicle. Payne introduced himself to Castillo and explained his presence. Castillo invited Payne and Hinds into his home.

Payne asked Castillo for driver's license information for the incident report, which Castillo provided. When asked about insurance, Castillo stated he had none. Hinds became visibly upset during Payne's conversation with Castillo regarding insurance. Hinds insisted the car had been inoperable, and therefore the insurance had been dropped. When the car was repaired, the insurance was not renewed. Payne indicated to Castillo that perhaps alcohol has been involved in the incident Castillo responded that he had four or five beers the night of the accident. Following Castillo's answer, Hinds interrupted the interview by saying to Castillo, "Salvador, you didn't have any beers, did you?"

Payne told Castillo that he needed to advise him of his Miranda rights and asked Castillo if he wanted Payne to read him the English version or to give him the written Spanish version for Castillo to read for himself. Castillo indicated he wanted to read the Spanish version. When Payne gave Castillo the card, Castillo did not appear to be reading it. Payne asked Castillo if he wanted his rights read to him in English, and Castillo responded affirmatively.

According to Payne, during or immediately after Payne read Castillo his rights, Hinds began interrupting again, in earnest. Hinds repeatedly yelled at Castillo, telling Castillo to deny having had anything to drink.

Hinds was repeatedly admonished by Payne that he should stop interfering. Hinds contends he told Castillo he did not have to answer Trooper Payne's questions. Trooper Payne then asked Hinds to step outside, so Payne could complete his interview with Mr. Castillo uninterrupted. Hinds left, but returned immediately, before Payne could resume his questioning of Castillo.

According to Payne, he than informed Hinds he was under arrest, and asked him to put his arms behind his back so that Payne could put handcuffs on him. Hinds allegedly grabbed the door frame, making it difficult for Payne to place the cuffs on him. Hinds is considerably taller than Payne Payne managed to get Hind's left wrist down and to get a handcuff on. Hinds pulled away, although he was aware Payne intended to cuff his right hand as well. Hinds then held onto the door frame with his left hand, while Payne had his right wrist. Hinds asked Castillo to help him during the struggle Payne was concerned Castillo, Hinds' employee, might intervene on Hinds' behalf. Payne grabbed the handcuff dangling from Hinds' left wrist and used it to remove the left wrist from the door frame.

Hinds contends that when he refused to leave the house, which he owned, that Payne blew his top, grabbed his arm and slapped on cuffs, spinning him around and tearing his "hide" Hinds contends he grabbed the door frame in an effort to steady his balance, after being grabbed by Defendant.

Payne escorted Hinds to his patrol car. Hinds claimed he was having difficulty breathing, and asked Payne to remove the cuffs so Hinds could retrieve his inhaler.

Payne instead retrieved the medicine himself, and after instruction from Hinds, administered the drug. Defendant contends Hinds would not sit in the patrol car so as to permit Payne to shut the door. Instead, he stiffened his legs and would not bend his body. Payne picked Hinds' feet up and put them into the car. Each time Payne would release Hinds' legs and attempt to close the door, Hinds would place his legs in the way. Payne eventually called for assistance from Chief of Police David Stanhope Stanhope arrived, at which time Plaintiff became cooperative, and Hinds was placed in the car.

During the drive to Keyes, Plaintiff informed Payne that his hands would be a mess because a little cut or scratch resulted in bleeding and bruises. When they arrived at the Courthouse, Payne discovered Hinds wrists were bleeding and swollen, although it did not appear the cuffs were ever tightened on his wrists. A criminal information was filed by the Texas County District Attorney's Office on November 12, 1997, charging Hinds with Obstructing an Officer and Resisting an Officer. Following a jury trial, Plaintiff was acquitted. Hinds subsequently filed this action seeking to recover damages from Trooper Payne and the Department of Public Safety. Defendants move for summary judgment on Plaintiff's claims.

Summary Judgment Standard

Summary Judgment is appropriate if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[A]

motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact." *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204 (10th Cir. 1977). Any doubt as to the existence of a genuine issue of material fact must be resolved against the party seeking summary judgment. *Board of Educ. v. Pico*, 457 U.S. 853, 863 (1982). In addition, the inferences drawn from the facts presented must be construed in the light most favorable to the nonmoving party. Nonetheless, a party opposing a motion for summary judgment may not simply allege that there are disputed issues of fact; rather, the party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. p. 56(e). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). The moving party is entitled to judgment as a matter of law when the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)

Discussion

Excessive Force

The Fourth Amendment to the United States Constitution guarantees persons the right to be free from the

use of excessive force by law enforcement officers during the course of an arrest. *Graham v. Connor*, 490 U.S. 386, 395 (1989). In *Graham*, the Supreme Court held that constitutional claims for excessive force "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard . . . " *Id.* "[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397 The Court "Judge[s] the reasonableness of the force used not with the '20/20 vision of hindsight' or from the serenity of chambers but from the perspective of the officer on the scene, allowing for the split-second nature of most law enforcement decisions." *Pride v. Does*, 997 F.2d 712, 716-17 (10th Cir.1993) (citing *Graham*, 490 U.S. at 396-97). In determining whether the force used by Defendant Payne was objectively reasonable, the Court considers "the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officer, and whether the subject is resisting arrest." *Wilson v. Meeks*, 52 F.3d 1547, 1553 (10th Cir. 1995).

Defendant's evidentiary material reveals disputed issues of fact regarding what occurred on November 12, 1997. According to Plaintiff's deposition, he was telling Castillo he did not have to answer Payne's questions, not offering the answers to the questions. Furthermore, according to Hinds, Trooper Payne grabbed his wrist and spun him around and cuffed him, before Hinds grabbed the door frame. Hinds claims he grabbed the door frame

to prevent a fall, as he was losing his balance. This testimony could be used to support a finding of excessive force. It is undisputed that Plaintiff was eighty-one years old at the time of the incident. There is evidence from his doctor that he would have been physically unable to resist given his medical condition. Although Defendant contends Hinds was physically threatening, in size and demeanor, this issue is disputed by the evidence presented. Hinds' testimony indicates a very different, and seemingly less abrasive situation, one that would not have called for the use of such extreme force. Hinds testimony contradicts Payne's assertion that Hinds was resisting, and therefore, additional force was necessary to effectuate the arrest.

The Court finds genuine issues of material fact remain for resolution at trial, precluding summary judgment in Defendant's favor. Accordingly, the instant motion is denied in this respect.

Qualified Immunity

Defendant Payne also seeks summary judgment on the basis of qualified immunity. A government official is entitled to qualified immunity when his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In considering a claim of qualified immunity, the Court uses a two-part framework: it first determines whether plaintiff has asserted a violation of a constitutional of statutory right,

and then decides whether that right was clearly established such that a reasonable person in Defendant's position would have known his conduct violated the right. *Garramone v. Romo*, 94 F.3d 1446, 1449 (10th Cir. 1996) (*citing Siegert v. Gilley*, 500 U.S. 226 (1991)).

In an excessive force case, however, the first prong of the qualified immunity analysis is somewhat different. The qualified immunity issue in an excessive force case is usually answered in the substantive Fourth Amendment inquiry, because the Fourth Amendment inquiry asks directly whether the police officer reasonably could have believed that the force was necessary under the circumstances *Dixon v. Richer*, 922 F 2d 1456, 1463 (10th Cir. 1991). Although qualified immunity may provide a strong defense in other contexts, in excessive force cases the substantive inquiry is the inquiry that decides whether the qualified immunity defense is available to the government actor. *Mick v. Brewer*, 76 F.3d 1127, 1124 (10th Cir.1996); *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir.1991). Having determined there are genuine issues of material fact remaining for trial on the excessive force claim, summary judgment on the basis of the first prong of the qualified immunity defense is inappropriate.

Furthermore, despite Defendant's argument to the contrary, it was clearly established at the time of this incident that citizens have the right under the Fourth Amendment to be free from the use of excessive force by government officials. *See Graham v. Connor*, 490 U.S. 386, 395 (1989); *Mick v. Brewer*, 76 F.3d 1127, 1135 (10th Cir.1996). By 1997 this right and the objective reasonableness standard to be applied to such cases were both

clearly established. Defendant's Motion for Summary Judgment is denied on this basis.

Eleventh Amendment Immunity

The Department of Public Safety seeks summary judgment on Plaintiff's claims against it, asserting it is entitled to Eleventh Amendment Immunity. In response to Defendant's argument, Plaintiff asserts he is not seeking damages pursuant to 42 U.S.C. § 1983 against the DPS, but rather is seeking damages pursuant to Oklahoma law. Plaintiff thereafter relies on cases addressing municipal liability under the Governmental Tort Claims Act. The Act, however, with regard to the State of Oklahoma, which includes the DPS, does not operate to waive sovereign immunity. Okla. Stat. tit. 51 § 152.1; *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 588 (10th Cir.1994). Accordingly Plaintiff's cases are inappropriate, and the DPS is entitled to summary judgment on Plaintiff's claims against it.

False Arrest

Plaintiff seeks damages for his alleged unlawful arrest. Defendant seeks summary judgment on this claim by asserting that because Mr. Hinds was bound over for trial a probable cause determination was made regarding his arrest, and therefore, he cannot pursue a Fourth Amendment claim for false arrest. Plaintiff responds by asserting that because he was charged with misdemeanors there was no preliminary hearing at which he was bound over for trial, and no probable cause determination was ever made. Absent evidence that a state

court made a finding of probable cause for the arrest, there is no basis for this aspect of Defendant's motion. Accordingly, Defendant's Motion for Summary Judgment is directed to Plaintiff's 42 U.S.C. § 1983 unlawful arrest claim is DENIED.

Conclusion

The Motion for Summary Judgment directed to Plaintiff's claims against the DPS is hereby GRANTED for the reasons stated herein. The motion, as directed to claims against Defendant Payne, is DENIED.

It is so ordered this 7th day of February 2000

/s/ David L. Russell
DAVID L. RUSSELL
CHIEF UNITED STATES DISTRICT JUDGE